TAN KHENG GUAN

v.

PENDAFTAR HAKMILIK JOHOR;
TEO AH BIN (INTERVENER)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-1070-1996]
11 FEBRUARY 1999

CIVIL PROCEDURE: *Ex parte application - Application to set aside - Jurisdiction and discretion of court - Principles of natural justice - Rule against bias and rule of hearing both sides - Inordinate delay - Whether fatal - Limitation*

LAND LAW: *Restraint on dealings - Registrar's caveat - National Land Code 1965, s. 320 - General considerations - Application to remove or discharge registrar's caveat*

CIVIL PROCEDURE: *Declaration - Jurisdiction of court - Pre-requisites for application - Conditions precedent - Court not to act in advisory capacity*

CIVIL PROCEDURE: *Pleadings - Function of pleadings - Importance of - Characteristics of a good affidavit - Significance of failure to reply*

CIVIL PROCEDURE: *Intervener proceedings - Circumstances in which intended intervener allowed to intervene - Interest of justice - Evidence of some real interest*

TRUSTS: *Resulting trust - Whether plaintiff holding property on trust for intervener - Whether there was intention to create a trust - Whether equitable - Whether estoppel by conduct applicable*

The subject matter of the instant dispute was 4/10 undivided share in the land held under Grant No. 26621 Lot No. 5128 in the Mukim of Plentong ('the said property') which formed part of a larger piece of land comprising 11 pieces of land ranging from Grant No. 26611 Lot No. 5110 to Grant No. 26621 Lot No. 5128, all in the Mukim of Plentong. The crux of the case revolved around three applications:

Enclosure 4

This was an *ex parte* application by the plaintiff seeking and praying for a declaratory judgment removing the registrar's caveat, declaration of rightful ownership of the property in question by the plaintiff and costs in the cause.

The court had by order dated 18 July 1978 ('the 1st order'), caused the said property to be registered in the name of Teo Ah Bin @ Teo Eng Bin ('the intervener') or his nominee or nominees and expunged the plaintiff's name from all records and documents relating thereto. By a court order dated 16 April 1980 ('the 2nd order'), the 1st order and all subsequent proceedings were set aside and the Registrar of Titles was ordered to enter a caveat on the said property to prevent any further dealing in the said property. The plaintiff's application was based on the grounds that he was the registered proprietor of the said property and there was a need to transfer the said property to the purchaser of the same.

Enclosure 8

This was the intervener's application to be permitted to intervene and be added as a party in the proceedings. The plaintiff had by an agreement dated 20 January 1973 ('the 1st agreement') purchased the said property and the intervener had at the plaintiff's request advanced the sum of RM125,033.91 as a loan to finance the said purchase. The plaintiff was to hold the said property in trust for the intervener until such time that the loan was repaid. By consent, the plaintiff's shareholding was registered as 4/10 and the intervener was allocated 6/10. Subsequently the plaintiff and the intervener executed an agreement dated 27 February 1974 ('the 2nd agreement') which accorded the parties a mutual option to purchase the said property for a consideration proportionate to their respective shareholdings. The intervener's option was rejected and the plaintiff then repudiated the 2nd agreement. The intervener's contention was that since the plaintiff had not repaid the loan he held the said property as trustee for the intervener.

Enclosure 23

This was an application by the intervener to set aside the court order dated 7 January 1997 ('the 3rd order') which had discharged the registrar's caveat and bestowed rightful ownership of the said property on the plaintiff. The intervener contended that order had been obtained *ex parte* and was not even served on the intervener. In any event the plaintiff was at all material times fully aware of the intervener's interest in the said property and his procurement of an *ex parte* court order to discharge the registrar's caveat was a blatant violation of the rules of natural justice and should be set aside as it adversely affected the intervener.

Held:

Enclosure 4

[1] The 2nd order remained a good and valid order as it had not been set aside. It is trite law that a person against whom an order has been issued is bound by a duty of obedience until such time as the order may be set aside or varied and non-compliance would incur the wrath of the court and invite the risk of being cited for contempt with all its attendant consequences.

[2] The registrar was empowered by s. 320 of the National Land Code 1965 ('NLC') to enter a caveat. Be that as it may, the severity of the prohibitory consequences of a registrar's caveat demanded that lodgment of the same required the exercise of a discretion that was akin to quasi-judicial in its nature. This discretionary power had to be in accordance with the rules of reason and justice and not at the mercy of private opinion.

[3] The general authority of the court was enshrined in s. 417 of the NLC and was exercisable whether on appeal or in an original application and it was there that a proper scrutiny could be made and the title of a proper claimant be declared and affirmed and perfected by subsequent registration on an order of court – insofar as such authorisation was not inconsistent with the whole scheme of the NLC.

[4] The plaintiff sought a declaration which is the appropriate remedy under the circumstances. *Albeit* a declaration was discretionary, the remedy served well to confirm contested legal rights be it subsisting or future. The plaintiff had by succinct, precise and clear affidavit evidence established the existence of a real and subsisting interest and a legal right which would be peculiarly affected without the court's intervention.

Enclosure 8

[5] The intervener had shown a direct interest which transcended mere commercial interest in the subject matter of the action and intervention was essential as the intervener was affected legally and financially and his rights and liabilities in relation to the subject matter were in jeopardy.

[6] The cornerstone principle of natural justice demanded that no man shall be condemned unheard and the rule should apply where an individual is adversely affected by an administrative decision regardless of the forum of the tribunal. The 3rd order had been procured *ex parte* and the intervener had no prior knowledge of the same. The order was

provisional in nature and therefore liable to be set aside by any person affected by that *ex parte* order. By virtue of the above and in the interest of justice, prayer (a) of encl. 8 was allowed.

Enclosure 23

[7] The matter was adjudicated *inter partes* justly and impartially, the intervener was accorded all avenues to advance his plight through learned counsel and there was stringent adherence to the principles of natural justice. The hearing was primarily based on affidavit evidence and the intervener's failure to respond to the plaintiff's and defendant's affidavits was construed as admittance to those allegations deposed therein.

[8] It was a fundamental and underlying rule of practice that an applicant for an *ex parte* order should and must make full and frank disclosure to the court or risk censure. The plaintiff had at all material times abided by that rule.

[9] At all material times prior to encl. 23, the money advanced by the intervener to the plaintiff had always been referred to as a loan or advance and nowhere did the intervener mention that the property was held on trust. Equity will only enforce a trust where there was a clear intention to create a trust – there was no such clarity of intention here. The intervener had held himself out as a lender and no resulting trust can possibly arise from that transaction. Application of estoppel by conduct and estoppel by representation to the factual matrix of the case would bar and disallow the intervener from raising the issue of a trust. Equity would not come to the intervener's aid as he had committed iniquity by failing to make a full and frank disclosure to the court.

[10] Under the Torrens System the register is absolute. The intervener had failed and/or neglected to comply with the explicit requirement to incorporate the 1st and 2nd agreements in the memorial of registration and this adversely affected his cause – the registrar was not obligated to endorse the words "as trustee" when a trust created outside the NLC was disclosed in an instrument of dealing.

[11] In any event if at all the intervener had a cause of action it would be in relation to money advanced and received which was unfortunately caught by the axe of limitation. Equity aids the vigilant and not the indolent and nothing but conscience, good faith and reasonable diligence can call forth the court into activity. Delay defeats equity – the

intervener had hibernated upon his right and acquiesced for a great length of time and the inordinate delay must be construed to his detriment.

[Enclosure 4 allowed; prayer (a) of encl. 8 allowed; encl. 23 dismissed with costs.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
A'Court v. Cross [1825] 3 Bing 329 ***(refd)***
AG v. Able [1984] QB 795 ***(refd)***
Alan Frederic Frazer v. Douglas Hamilton Walker [1967] 1 AC 569 ***(refd)***
Arab-Malaysian Merchant Bank Bhd v. Jamaludin Dato' Mohd Jarjis [1991] 2 MLJ 27 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***
Bloomfield v. Serenyi [1945] 2 All ER 646 ***(refd)***
Boyle v. Sacter [1888] 39 Ch D 249 ***(refd)***
Bradlaugh v. Gossett [1883-84] 12 QBD 271 ***(refd)***
Che Dah v. Commissioner of Land Titles (Penang and Malacca) Penang [1973] 2 MLJ 29 ***(refd)***
Cholmondeley v. Clinton [1820] 2 J&W 1 ***(refd)***
Cory v. Gertcken [1816] 2 Madd 40 ***(refd)***
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871 ***(refd)***
Creelman & Anor v. Hudson Bay Insurance Co [1920] AC 194 ***(refd)***
Cunningham v. Foot [1878] 3 App Cas 974 ***(refd)***
Dimes v. Grand Junction Canal [1852] HLC 759 ***(refd)***
Dobbie v. Medway Health Authority [1994]4 All ER 450 ***(refd)***
Evroy v. Nicholas [1733] 2 Eq Ca Abr 488 ***(refd)***
Fu Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd [1989] 2 CLJ 296 ***(refd)***
Ghulam Muhammad Sayeed & Ors v. Perwira Habib Bank (Malaysia) Bhd & Ors [1989] 2 MLJ 375 ***(refd)***
Gill v. Lewis [1956] 2 QB 1 ***(refd)***
Gillick v. West Norfolk and Wisbech Health Authority [1986] AC 112 ***(refd)***
Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***
Grunwick Processing Laboratories v. Advisory Conciliation and Arbitration Service [1978] AC 655 ***(refd)***
Harrison v. Croydon London Borough Council [1968] Ch 479 ***(refd)***
HMS Archer [1919] P 1 ***(refd)***
Hodge v. Churchward [1874] 16 Sim 71 ***(refd)***
Home Office v. Commission for Racial Equality [1982] QB 385 ***(refd)***
Hong Leong Finance Bhd v. Staghorn Sdn Bhd [1995] 3 CLJ 368 ***(refd)***
Imperial Tobacco v. AG [1981] AC 718 ***(refd)***
Industrial & Commercial Realty Co Ltd v. Merchant Credit Pte Ltd [1980] 1 MLJ 208 ***(refd)***
Jones v. Lenthal [1669] 1 Ch Ca 154 ***(refd)***
Kanda v. Government of the Federation of Malaya [1962] MLJ 169 ***(refd)***

Ketua Pengarah Kastam v. Ho Hwan Seng [1977] 2 MLJ 154 ***(refd)***
Lazard Brothers & Co v. Midland Bank [1933] AC 307 ***(refd)***
Lim Cho Hock v. Speaker, Perak Legislature Assembly [1979] 2 MLJ 85 ***(refd)***
Lloyd's v. Butler [1950] 1 KB 76 ***(refd)***
Malone v. Metropolitan Police Commissioner [1979] Ch 344 ***(refd)***
Manuel v. AG [1983] Ch 77 ***(refd)***
Mason v. Clarke [1954] 1 QB 460 ***(refd)***
Metropolitan Properties Co (FGC) Ltd v. Lannon & Ors [1968] 3 All ER 304 ***(refd)***
Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd [1991] 4 All ER 65 ***(refd)***
Nail v. Punter [1832] 5 Sim 555 ***(refd)***
Overton v. Banister [1844] 3 Hare 503 ***(refd)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988]1 CLJ 31 ***(refd)***
Pharmaceutical Society of Great Britain v. Dickson [1970] AC 403 ***(refd)***
Public Textiles Bhd v. Lembaga Letrik Negara [1976] 2 MLJ 58 ***(refd)***
R v. London Transport Executive ex p Greater London Council [1983] QB 484 ***(refd)***
R v. Secretary of State for Economics ex p GLC [1985] (The Times 30 December) ***(refd)***
R v. Secretary of State for the Home Department ex p Generics (UK) Ltd [1992] COD 237 ***(refd)***
R v. Sussex Justices, ex p McCarthy [1923] All ER Rep 233 ***(refd)***
Re Barnato [1949] Ch 258 ***(refd)***
Re Carnarvon Harbours Acts 1793 to 1903 [1937] 1 Ch 72 ***(refd)***
Re Lush's Trusts [1869] 4 Ch App 591 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***
Royal College of Nursing v. Department of Health and Social Security [1982] AC 800 ***(refd)***
Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438 ***(refd)***
Sanders Lead Co Inc v. Entores Metal Brokers Ltd [1984] 1 All ER 857 ***(refd)***
Seet Soh Ngoh v. Venkateswara Sdn Bhd [1970] 1 MLJ 242 ***(refd)***
Sharp v. Wakefield [1891] AC 173 ***(refd)***
Smith v. Clay [1767] 3 Bro CC 639n ***(refd)***
Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor [1997] 2 CLJ 548 ***(refd)***
Sungei Biak Tin Mines Ltd v. Saw Choo Theng (No 2) [1970] 2 MLJ 226 ***(refd)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 2 MLJ 177 ***(refd)***
The Hagen [1908] P ***(refd)***
WEA Records Ltd v. Visions Channel 4 Ltd [1983] 1 WLR 721 ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11 ***(refd)***

Legislation referred to:
Evidence 1950, s. 115
National Land Code 1965, ss. 320, 344, 417
Rules of the High Court 1980, O. 6 r. 7(1), O. 15 rr. 6(2)(b)(ii), 16, O. 32 r. 6
Rules of the Supreme Court 1957, O. 16 r. 11
Specific Relief Act 1950, s. 41

Rules of the Supreme Court [UK], O. 15 r. 2(b)(ii)

Other source(s) referred to:
HAJ Ford & WA Lee, *Principles of the Law of Trusts,* 1983 edn, pp 67, 964
LA Sheridan, *The Law of Trusts,* 12th edn, p 191
Lord Denning, *The Discipline of the Law*
Professor Keeton, *The Law of Trusts,* 9th edn, 1968, p 5
Woolf & Zamir, *The Declaratory Judgment,* 2nd edn

For the plaintiff - S Theivanthiran (Badrol Hisham Mohd Sani); M/s Zainal & Badrol
For the defendant - Abdul Rasid Sudin SFC
For the intervener - S Sagadeva; M/s Saga, Raja & Kumar

Reported by K Ganesh

JUDGMENT

Abdul Malik Ishak J:

Enclosure 4

By way of an *ex parte* originating summons dated 23 December 1996 and filed on the same day as reflected in encl. 4, the plaintiff sought for the following orders:

(a) that the Registrar's caveat entered on October 28, 1987 *vide* Jilid No: 288 Folio 39 Presentation No: 3556/87 for 4/10 of the property held under Grant No: 26621 Lot No: 5128, Mukim Plentong be discharged or removed.

(b) that a declaration be given that 4/10 of the property held under Grant No: 26621 Lot 5128, Mukim Plentong is owned by the plaintiff.

(c) that costs of this application be costs in the cause.

The *ex parte* originating summons in encl. 4 involved the plaintiff and the defendant only and it was supported by an affidavit of the plaintiff himself that was dated 23 December 1996 and filed on the same day as shown in encl. 2. A certificate of urgency was also filed by Miss Susan Yeap Shuh Sin, learned counsel for the plaintiff, and there it was stated that the plaintiff had signed a sale and purchase agreement with Finest Vision Sdn Bhd on 26 November 1996 for the property held under Grant No: 26621,

Lot No: 5128, Mukim Plentong (hereinafter referred to as the "property"); and for that reason the registrar's caveat entered on that property be discharged or removed so that the transfer of that property may be effected. At the outset, Madam Nora S.W. Lam, learned counsel for the plaintiff, orally applied to amend prayer (a) to encl. 4 by adding the figure "4/10" therein and this was accordingly granted.

Enclosure 4 supported by an affidavit in encl. 2 came up for hearing, *ex parte*, before me on 7 January 1997. This was a crucial date as demonstrated later in this judgment. The plaintiff deposed in encl. 2 that by order of the learned Judicial Commissioner of the High Court in chambers *vide* Civil Suit No: 214 of 1974 dated 18 July 1978 – exhibited and marked as "TKG1", the defendant (formerly known as the Commissioner of Lands and Mines Johore) was ordered to transfer and register 4/10 undivided shares in each of the 11 pieces of lands in the Mukim of Plentong held under H.S.(D) 433 to 440, 442, 444 and 450 for Lots 5110 to 5117 and 5120, 5122 and 5128 from the plaintiff to Teo Ah Bin @ Teo Eng Bin or his nominee or nominees and expunge the name of the plaintiff from all records and documents relating thereto. The High Court by its order dated 18 July 1978 also ordered Teo Ah Bin @ Teo Eng Bin to pay into the court the sum of $168,166.09, and Teo Ah Bin @ Teo Eng Bin was also awarded damages to be assessed by the senior assistant registrar, and, lastly, it was ordered that the costs of the application and the suit be paid by the plaintiff. The plaintiff also deposed in encl. 2 that by order of the learned judge of the High Court in chambers *vide* Civil Suit No: 214 of 1974 dated 16 April 1980 – exhibited and marked as "TKG2", the order of the High Court dated 18 July 1978 was set aside and all subsequent proceedings were also set aside. The High Court by its order dated 16 April 1980 also ordered that the Registrar of Titles, Johore to enter Registrar's caveats to prevent any dealing in the 4/10 undivided share of the plaintiff in the lands held under:

(a) Grant No: 26611 Lot No: 5110 Mukim of Plentong.

(b) Grant No: 26612 Lot No: 5111 Mukim of Plentong.

(c) Grant No: 26613 Lot No: 5112 Mukim of Plentong.

(d) Grant No: 26614 Lot No: 5113 Mukim of Plentong.

(e) Grant No: 26615 Lot No: 5114 Mukim of Plentong.

(f) Grant No: 26616 Lot No: 5115 Mukim of Plentong.

(g) Grant No: 26617 Lot No: 5116 Mukim of Plentong.

(h) Grant No: 26618 Lot No: 5117 Mukim of Plentong.

(i) Grant No: 26619 Lot No: 5120 Mukim of Plentong.

(j) Grant No: 26620 Lot No: 5122 Mukim of Plentong.

(k) Grant No: 26621 Lot No: 5123 Mukim of Plentong.

The High Court by its order dated 16 April 1980, lastly, ordered that the costs of the application be costs in the cause.

The plaintiff further deposed in encl. 2 that the Registrar of Titles, Johore entered a registrar's caveat under s. 320 of the National Land Code 1965 ("NLC") on the property in question. Form 7, showing the entry of the Registrar's caveat was duly exhibited and marked as "TKG3" of the encl. 2 and that Form 7 was worded thus:

FORM 7

(Section 320)

ENTRY OF REGISTRAR'S CAVEAT

By virtue of the powers conferred on me by section 320 of the National Land Code, I have entered a Registrar's Caveat on the land held under title no: G 26611 hingga G 26621 for Lot no: 5110 hingga 5117, 5120, 5122 dan 5128 Mukim Plentong District of Johor Bahru for the following reason:

Sebagaimana Perintah Mahkamah Civil Suit No. 214 of 1974 Misc. Doc. Jilid. 221 Fol. 55 bertarikh 30/8/87 mengikat 4/10 bahagian tanah.

This caveat shall, so long as it continues in force, prohibit the registration, endorsement or entry on that document, of any instrument of dealing, any claim to the benefit on a tenancy exempt from registration and any lien-holder's caveat. This prohibition shall apply to any such instrument, claim or application notwithstanding that it was received before this caveat was entered.

Dated this 27 day of October, 1987.

Sgd (Illegible)
...
Registrar of Titles
Johore.

Presentation No: 3556/87
Jilid No: 288 Folio 39
Dated 28 October, 87 at
2.00 petang.

The plaintiff also deposed in encl. 2 that the property has since been vested and registered in his name. A copy of the title to the property exhibited as "TKG4" indeed bore out what the plaintiff had deposed. His name was registered therein as the 4/10 owner of the property. For these reasons, the plaintiff sought for the discharge or removal of the registrar's caveat on the property.

Now, five salient observations must be made here. Firstly, the order of the High Court dated 18 July 1978 was set aside by another order of the same High Court dated 16 April 1980. Secondly, the order of the High Court dated 16 April 1980 remained a good and valid order till today as it had not been set aside. Lord President Tun Hamid Omar in *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 SC in classic style said at p. 212:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

Thirdly, the power of the registrar to enter a registrar's caveat is provided for in s. 320 of the NLC which list the circumstances under which such caveats may be entered. The effect of a registrar's caveat is said to be "more severe than that of a private caveat" (per Lord Diplock in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44 PC at p. 46 right hand column at "F"). In that case, Lord Diplock at the same page spoke of the severity of the registrar's caveat in this way:

> ... it operates to prohibit the registration, endorsement or entry of instruments, claims to exempt tenancies and *lien*-holder's caveats which were received at the registry before the time of entry of the registrar's caveat if they have not been already entered on the register of title by then. On the other hand the registrar may waive the prohibition in any case where he is satisfied that this would not be inconsistent with the purpose for which the caveat was entered.

Continuing at p. 47 of the same case, Lord Diplock succinctly said:

> Under these sections (referring to sections 320 and 321(3) of NLC) the registrar's functions in relation to registrar's caveats are not exclusively ministerial as they are in relation to the other kinds of caveats. They require the exercise of a discretion that is quasi-judicial in its nature. The pro-hibitory consequences resulting from the entry of a registrar's caveat impose what may

> be very damaging restrictions upon the private rights of the proprietor of the land. The registrar is not entitled to impose them unless they appear to him to be necessary or desirable for one or more of those purposes which upon the true construction of the section are specified in paragraph (a) or (b) of section 320(1) or necessary or desirable to counteract such documentary error as is mentioned in paragraph (c).

Chang Min Tat J (as he then was) in *Seet Soh Ngoh v. Venkateswara Sdn Bhd* [1970] 1 MLJ 242 held that where the registrar was before the court on a different matter he could be ordered to enter his caveat in circumstances where the *status quo* of title to land should be preserved pending court determination of a dispute. But it must be emphasised that the registrar's exercise of his discretionary power must be "done according to the rules of reason and justice, not according to private opinion ... according to law and not humour. It is to be, not arbitrary, vague and fanciful but legal and regular." (per Lord Halsbury in *Sharp v. Wakefield* [1891] AC 173, at p. 179).

Fourthly, the general authority of the court under s. 417 of the NLC can never be doubted. Suffian FJ (as he then was) in *Sungei Biak Tin Mines Ltd v. Saw Choo Theng (No. 2)* [1970] 2 MLJ 226, in a well-written judgment, succinctly laid down the circumstances appropriate to apply s. 417 of the NLC. There his Lordship said at p. 227 of the report:

> I am of the opinion that this application should be allowed.
>
> It is true that the order of the Federal Court has been perfected and that nowhere in it is mentioned liberty to apply, but in view of what happened immediately after delivery of our judgment it was the clear intention of this court to allow the defendant to make this application. In any event in every order of the court liberty to apply to the court is implied, without its being expressly reserved, *Fritz v. Hobson* [1880] 14 Ch. D. 542.
>
> Our judgment says that the defendant company was not guilty of breach of condition and that therefore its sublease should not have been cancelled. If it had not been cancelled, then the company would still have been the sublessee, and it alone had power to dispose of any interest in the land; the plaintiffs could not have done so and if they have done so to the detriment of the company's right, the court is not powerless to get Mr. Lee Yat Kai off the register. Section 417 of the National Land Code clearly says that the court has power to direct the collector to do all such things as may be necessary to give effect to its judgment or order. If we did not order the collector to remove Mr. Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr. Lee to thumb their noses at a judgment of the Federal Court, and I do not think that we should allow that. We should give effect to our judgment and order the collector to get Mr. Lee off the register and put the defendant company back on it.

> Mr. Lee knew that though the plaintiffs had won and the High Court had ordered the deletion of the defendant's sublease the defendant had lodged an appeal, and yet he took a sublease from the plantiffs. I do not think it right that he should be allowed to remain on the register.
>
> When the collector takes action to comply with our order he should, of course, cause notice of his action to be served upon any person or body having a claim protected by caveat; subsection (3) of section 417.
>
> In ordering the deletion of the cancellation of the defendant's sublease and cancelling the registration of the new sublessee's sublease this court is not exercising original, but appellate jurisdiction which is governed by subsection (4) of section 69 of the Courts of Judicature Act which gives us power not only to make any order which ought to have been made but also to 'make such further or other order as the case requires.' The case plainly requires that the defendant be restored to the register.

In *Che Dah v. Commissioner of Land Titles (Penang and Malacca) Penang* [1973] 2 MLJ 29, Chang Min Tat J (as he then was) had this to say of s. 417 of the NLC at p. 31 of the report:

> Provision is consequently made in the Code for an appeal from any decision, including a refusal, of the Registrar. It lies in section 418. The general powers of the court or a judge are contained in section 417 which are exercisable whether on appeal or in an original application and it is there that a proper scrutiny could be made and the title of a proper claimant be declared and affirmed and perfected by subsequent registration on an order of court.

But a caveat must be added. The general powers of the court under s. 417 of the NLC are not all encompassing. Lord Diplock speaking for the Privy Council in *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 observed lucidly at p. 270 that s. 417 of the NLC:

> ... does not authorise the court to direct the Registrar to make on the register entries of a kind for which no express provision is made by the National Land Code and which are inconsistent with the whole scheme of the Act; ... .

Fifthly, the declaration which the plaintiff sought can be said to be a valuable remedy in settling disputes between the parties ("*The Declaratory Judgment*" by Woolf and Zamir, 2nd edn). In essence, a declaratory judgment states clearly the rights or legal position of the parties as they stand before the court. It merely states some existing legal situation. It enables a party to discover what his legal position is and it opens the way for the party to use other remedies in order to give effect to it, if that is considered to be necessary. Indeed declaration is a discretionary remedy. To prevent its abuse the court has always the inherent powers to refuse declaratory reliefs to mere speculators, busybodies, and those people

who ask hypothetical questions (*Re Barnato* [1949] Ch 258, *Harrison v. Croydon London Borough Council* [1968] Ch 479). The court will also refuse declaration to those people who have no interest at all. An applicant for a declaration must have some legal right of his own which is in issue before the court can assist him. Without legal right there is nothing for the court to declare his legal position. In *Gouriet v. Union of Post Office Workers* [1978] AC 435 at 501, Lord Diplock aptly said:

> But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.

Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, summarised the Scots law which was applicable in England in these words:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

The court too does not act in an advisory capacity by way of declaration as to the law in the abstract (*R v. Secretary of State for the Home Department ex parte Generics (UK) Ltd* [1992] COD 237). It must be emphasised that there must be someone with a genuine interest in opposing the application, that someone may be referred to as a "proper contradictor" (*Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448). The list of when the courts would refuse declaratory reliefs are endless. Suffice for this exercise that a few of them will now be itemised:

(1) A declaration will not be granted where the respondent agrees with the applicant's claim (*Re Carnarvon Harbours Acts 1793 to 1903* [1937] 1 Ch 72).

(2) No declaration would be forthcoming when it seeks to determine whether the particular conduct does or does not constitute a criminal offence (*Imperial Tobacco v. AG* [1981] AC 718; and *A.G v. Able* [1984] QB 795).

(3) No declaration would be granted when the applicant seeks to raise matters concerning the internal proceedings of Parliament (*Bradlaugh v. Gossett* [1883-84] 12 QBD 271), or the validity of Acts of Parliament (*Manuel v. AG* [1983] Ch 77).

(4) The court will not grant declarations in relation to treaties which have no direct legal effect in the United Kingdom (*Malone v. Metropolitan Police Commissioner* [1979] Ch 344).

This judgment would be incomplete if I do not itemise the situations where declarations were granted by the courts in public law disputes. Thus, the courts have held that declarations should issue in the following situations:

(1) Where it was to establish the validity of advice given in a non-statutory circular by a government department, declarations were used where the Department of Health and Social Security gave advice on contraception (*Gillick v. West Norfolk and Wisbech Health Authority* [1986] AC 112) and on the subject of abortion (*Royal College of Nursing v. Department of Health and Social Security* [1982] AC 800).

(2) Where the applicant sought to challenge the reasoning in a decision by a public body and when it involved a point of general public importance (*R v. Secretary of State for Economic ex parte GLC* [1985] The Times, 30 December).

(3) Where the applicant sought to determine whether a proposed course of action was within the powers of a public body, for example proposed contributions to London Transport by the Greater London Council (*R v. London Transport Executive ex parte Greater London Council* [1983] QB 484) or for that matter a proposed investigation by the Commission for Racial Equality *(Home Office v. Commission for Racial Equality* [1982] QB 385).

(4) Where it was to determine the lawfulness of recommendations by advisory bodies, for example, to recognise a trade union (*Grunwick Processing Laboratories v. Advisory Conciliation and Arbitration Service* [1978] AC 655).

(5) Where it was to determine, in advance, the validity of proposed regulations or rules, for example, a proposed rule of professional conduct (*Pharmaceutical Society of Great Britian v. Dickson* [1970] AC 403).

One question arises: What if the respondent chooses to ignore the declaration? The court will not remain idle. The court will grant leave to apply for an injunction or other relief which could be enforced by way of an application for committal. No one can simply thumb their nose against the order of the court. An order of the court must be obeyed to the fullest. The recalcitrant will be hauled up in court, so to speak, for contempt and the sentence meted out may be penal in nature. That is the present trend and the judicial thinking of judges.

In Malaysia, s. 41 of the Specific Relief Act 1950 makes provisions for a declaratory decree. Order 15 r. 16 of the RHC gives a broader power to issue declarations and it states:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

and the applicant needs only to establish that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Cho Hock v. Speaker, Perak Legislature Assembly* [1979] 2 MLJ 85).

On perusal of encl. 2 and relying on the facts as alluded to therein together with the law distilled from the authorities as cited and discussed, I have no hesitation to allow the prayers as sought for in encl. 4. All three prayers, namely, prayers (a), (b) and (c) of encl. 4 were allowed by me on 7 January 1997.

Enclosure 8

The next important date would be 2 March 1998. On that day, the prospective intervener's application by way of a summons in chambers dated 8 July 1997 which was filed on the same day as reflected in encl. 8 was heard. Enclosure 8 sought for the following orders:

> (a) Perintah Mahkamah bahawa Pencelah yang dicadangkan dibenarkan untuk mencelah di dalam prosiding di atas dan selanjutnya ditambahkan sebagai pihak dalam tindakan ini;
>
> (b) Bahawa perintah bertarikh 7/1/1997 yang diberikan oleh Mahkamah Yang Mulia ini diketepikan;
>
> (c) Bahawa kos diperuntukkan untuk permohonan ini;
>
> (d) Lain-lain relif yang difikirkan adil dan suaimanfaat oleh Mahkamah Yang Mulia ini.

and it was supported by an affidavit of the prospective intervener himself that was affirmed on 1 July 1997 and filed on 8 July 1997 as seen in encl. 7. The plaintiff responded by filing an affidavit deposed by the plaintiff himself on 8 August 1997 which was filed on 12 August 1997 as reflected in encl. 9. In short, encl. 9 replied to encl. 7. There was no reply by the propective intervener to encl. 9. Not wanting to be left out, the defendant through Mr. Adib Azhari bin Daud affirmed an affidavit in reply on 21 October 1997 as reflected in encl. 20 and this was as a reply to

encl. 7. Again the prospective intervener did not file an affidavit to counter encl. 20. In *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339, I adverted to the importance of affidavit evidence at p. 342 in these words:

> Here, the crucial question to ask is this: Was the plaintiff obliged to file an affidavit in reply in enclosure 12 as filed by the Dato' Bandar? Obviously, the whole case had to be decided on affidavit evidence alone and thus the plaintiff should have filed an affidavit in reply as he must have realized the importance of replying to the Dato' Bandar's affidavit. Consequently, the failure of the plaintiff in filing an affidavit in opposition would mean that the plantiff admits to what was alleged in enclosure 12 (*Overseas Investment Pte Ltd v. Anthony O'Brien & Anor* [1988] 3 MLJ 332). Way back in 1986, Lee Hun Hoe CJ (Borneo) (as he then was) said in *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382:
>
> > There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.
>
> In my judgment, affidavits play a crucial role in originating summonses as submissions and decisions are primarily hinged on affidavit evidence. I am sure the plaintiff being a lawyer should know the value of affidavit evidence in an application of this nature. He should know and cannot be said not to know that affidavits should contain facts known to him and not legal arguments and submissions of law (*Alfred Dunhill Ltd v. Sunoptic SA* [1979] FSR 337 at pages 352 and 373).

Now, since the prospective intervener did not respond to encls. 9 and 20, he must be taken to have accepted the averments in these two enclosures. The prospective intervener too can be said to admit to those allegations as found in these two enclosures. Incidentally, to keep the record straight, the case of *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru (supra)* was also reported in two other popular local law journals, *vide* [1995] 2 MLJ 287 and [1995] 2 AMR 1174.

Succinctness, precision and clarity should be the guidelines for drafting affidavits. Judges have to read numerous affidavits and to enable the judge to understand and grasp the evidence with ease, an advocate must adhere to certain well known principles. Foremost would be precision in expression. An affidavit should be as brief as possible without sacrificing the content and the trend of the evidence. A protracted and long winded affidavit is less likely to be clear in spite of its length. No judge would be grateful for the extra reading to be done unless there is some semblance of justification. Effective drafting must necessarily involve a good grasp of the language especially its grammar and vocabulary. It is an art to draft

a good affidavit. The draftsman must be able to choose the right words at the right time in order to convey a motley of facts. An understandable affidavit is a good affidavit. These are general observations which would be beneficial to practising lawyers.

I will now examine the affidavits in relation to encl. 8.

In encl. 7, the prospective intervener deposed to the following set of facts. He referred to the originating summons in encl. 4 especially its prayers thereto and said that he had a beneficial interest to the property in question. He said that the 4/10 undivided share referred to by the plaintiff in encl. 4 relate to and are part of a larger piece of land comprising of 11 pieces of lands ranging from Grant No: 26611 Lot No: 5110 Mukim of Plentong to Grant No: 26621 Lot No: 5123 Mukim of Plentong. He said that pursuant to an agreement dated 20 January 1973 the plaintiff had been granted an option to purchase these lands from one Treego Galian Sdn Bhd comprising of a total area of 50 acres 2 roods 3 poles free from encumbrances at RM5,500 per acre. It was said that the preamble to the agreement dated 20 January 1973 stipulated that the plaintiff was to exercise the option to purchase by paying 10% of the total purchase price on or before 20 January 1973. Since the plaintiff had no financial resources to pay that 10% as required, the plaintiff sought financial assistance from the prospective intervener who then paid both the 10% and the balance of the purchase price totalling RM277,853. The prospective intervener then referred to the full terms of the agreement dated 20 January 1973. He said that by cl. 2 of the agreement the property was to be transferred free from encumbrances to the plaintiff and himself at the proportion of 9/20 and 11/20 undivided shares respectively. It was deposed by the prospective intervener that upon the plaintiff's request he advanced RM125,033.91 as a loan to the plaintiff to enable the latter to finance his portion of the share. By cl. 2 of the agreement dated 20 January 1973, until the plaintiff has repaid RM125,033.91 to the prospective intervener, the plaintiff was to hold in trust the 9/20 share for and on behalf of the prospective intervener. By cl. 4 of the agreement dated 20 January 1973, it was provided, *inter alia*, that if the property was subsequently developed both the plaintiff and the prospective intervener have to apportion the net profits in proportion to their shareholding. It was said that on 14 March 1973 the shareholding that was registered in favour of plaintiff was 4/10 while the prospective intervener was allocated 6/10. The prospective intervener deposed that prior to the purchase of the property he had paid a further sum of RM106,800 as earnest money to secure the purchase from the then vendor. The plaintiff had not, till today, contributed financially for his 4/10 share in the property. It was further deposed that sometime

in 1974, the plaintiff had approached the prospective intervener and suggested that the plaintiff be given a final opportunity to pay for the value of his 4/10 share. The prospective intervener agreed and an agreement was entered between the parties on 27 February 1994. The value that was agreed upon for the whole of the property was RM1 million. The terms of the agreement dated 27 February 1974 enabled both parties to give an option to one another to purchase the other's share for a consideration proportionate to their shareholding. But alas, the plaintiff failed to exercise the option. On 30 April 1974, the prospective intervener then exercised his option by making payment of RM40,000 to Messrs Allen & Gledhill, Johor Bahru (the then solicitors of the plaintiff) through the prospective's intervener's then solicitors Messrs Ho Thian Cheh & Co. The defendant through his solicitors rejected that payment and repudiated the agreement dated 27 February 1974. Of pertinence to note would be the prospective intervener's averment that Civil Suit No: 214 of 1974 was abated due to procedural reasons, after an appeal. It was deposed that to date the plaintiff had not settled the payment of his 4/10 share under the agreement dated 20 January 1973 and this meant that the plaintiff was still holding the 4/10 undivided share in trust for the prospective intervener. It was also deposed that the prospective intervener came to know from some sources that the plaintiff was offering for sale his 4/10 of the property and with that kind of information the prospective intervener decided to cause a search to be made at the Registry of Land Titles sometime in June 1997. That search revealed, so it was deposed, that the plaintiff had on 7 January 1997 obtained a court order which discharged or removed the registrar's caveat that was entered on 28 October 1987 and the court order too declared the plaintiff as the owner of the 4/10 of the property. It was also deposed that the order of the High Court dated 7 January 1997 was obtained *ex parte* and that court order was not even served on the prospective intervener. It was deposed that the plaintiff knew at all material times that the prospective intervener had an interest in the whole matter as the plaintiff was said to hold that share as trustee for the prospective intervener. It was further deposed that the plaintiff proceeded to obtain the declaration contrary to the rules of natural justice and as such it should be set aside as it directly affected the prospective intervener. The prospective intervener then sought for the prayers as itemised in encl. 8. Impartiality and fairness are the key factors in the rules of natural justice (*Kanda v. Government of the Federation of Malaya* [1962] MLJ 169) and anyone exercising judicial or quasi-judicial functions must observe the rules of natural justice. Over the years, the essential characteristics of natural justice have keen refined and two essential elements have surfaced. For brevity, they may be stated as follows:

(i) the rule against bias; and

(ii) the rule of hearing both sides.

It is certainly not an easy task to determine the rule against bias. Suffice for this exercise to say that it relates to not only an area where the adjudicator is a party but it even extends to an area where the adjudicator has an interest (*Dimes v. Grand Junction Canal* [1852] HLC 759). Lord Hewart CJ in *R v. Sussex Justices, Ex p. McCarthy* [1923] All ER Rep. 233 at p. 234; [1924] 1 KB 256 at p. 259 said:

> ... it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done.

Lord Denning MR in *Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon And Others* [1968] 3 All ER 304 CA at p. 310 said:

> It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R v. Huggins* [1895-99] All ER Rep. 914; [1895] 1 QB 563; *R v. Sunderland Justices* [1901] 2 KB 357 at page 373; per Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v. Camborne Justices, Ex p. Pearce* [1954] 2 All ER 850; [1955] 1 QB 41 at pages 48-51; *R v. Nailsworth Justices, Ex p. Bird* [1953] 2 All ER 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

The latin maxims would govern the rule of hearing both sides:

(i) *audi alteram partem* (hear the other side); and

(ii) *audiatur el altera pars* (no man should be condemned unheard).

Raja Azlan Shah FJ (as His Majesty then was) in *Ketua Pengarah Kastam v. Ho Hwan Seng* [1977] 2 MLJ 154 succinctly said:

> The rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.

I am sure, by now, that public authorities in Malaysia are well versed with these basic principles of natural justice and they would apply them dutifully and conscientiously. The only problem is to apply the principle to a given set of facts. I will endeavour to apply these principles in due course.

The next affidavit to consider in relation to encl. 8, would be the affidavit of the plaintiff in encl. 9. There the plaintiff deposed that 4/10 of the property belonged to him since 1973, and he has been registered as the proprietor without any action being taken by the prospective intervener to take back that portion of property or even to correct the register document of title. The plaintiff categorically denied that the prospective intervener had any beneficial interest on 4/10 of the property belonging to the plaintiff, at any time. On the contrary, since both parties were not in accord in regard to the development of the property, it was said that both parties entered into an agreement dated 27 February 1974 wherein the plaintiff agreed to purchase the 6/10 share belonging to the prospective intervener at the price of RM600,000 within a stipulated time period. But in the event the plaintiff failed to do so, then the prospective intervener was entitled to purchase the plaintiff's share of 4/10 of the property at the price of RM400,000. It was deposed by the plaintiff that his entitlement to the 4/10 of the property was acknowledged by the prospective intervener in the agreement dated 27 February 1974. It was deposed that without prejudice to the plaintiff, the plaintiff admitted the purchase of eleven pieces of lands adverted to by the prospective intervener in encl. 7 and averred that the purchase was accomplished with the assistance of the prospective intervener. By way of a consideration for the assistance rendered by the plaintiff, the prospective intervener was given 11/20 (55%) shares in that land and the balance of 9/20 (45%) was registered in the name of the plaintiff. It was deposed that according to the agreement dated 20 January 1973 the price for the plaintiff's share came up to RM125,033.91 and that money was supposed to be repaid to the prospective intervener. It was also deposed that the property was not trust property. The plaintiff proceeded to depose that he was advised and verily believed that the agreement dated 27 February 1974 superceded the agreement dated 20 January 1973. The sum of RM125,033.91 was an advancement or a loan as admitted by the prospective intervener in encl. 7 para. 8. It was deposed that after the agreement dated 20 January 1973, the prospective intervener

requested for 5% share from the 9/20 share belonging to the plaintiff as the prospective intervener had incurred expenses totalling RM106,500. The plaintiff agreed to the request and the shares were apportioned to 4/10 (40%) for the plaintiff and 6/10 (60%) for the prospective intervener. In regard to the sum of RM125,033.91 that was meant to be repaid by the plaintiff when the latter purchased the 6/10 share of the prospective intervener, the plaintiff reiterated that, at all material times, that money was meant to be an advancement or a loan. It was deposed that the 4/10 share of the plaintiff constituted an unregistered charge and it did not belong to the prospective intervener. The plaintiff once again reiterated that the prospective intervener had no beneficial interest over the 4/10 share which belonged to the plaintiff. The plaintiff emphasised that right from the very beginning the prospective intervener was only entitled to receive RM125,033.91 for the following reasons:

(1) In the written agreement, the amount was described as a "loan or advance".

(2) In the affidavits of the prospective intervener in civil suit no: 214 of 1974 dated 21 May 1977 (exh. P3 of encl. 9) and 27 December 1977 (exh. P4 of encl. 9), that amount was again described as a "loan or advance".

(3) In the "surat akuan" of the prospective intervener to support the entry of a private caveat on the property on 26 February 1997, not a single word was used to indicate that it was a "trust" and that "surat akuan" was exhibited as "P5" in encl. 9.

(4) Why did the prospective intervener purchase the plaintiff's option if the prospective intervener had a beneficial interest over the property? This fact was said to confirm that the prospective intervener did not have a beneficial interest over 4/10 share of the plaintiff to the property but rather a right to claim the money.

The plaintiff then deposed and in the course of which drew the court's attention to the sale of eight pieces of lands that were protected by the registrar's caveats. It was deposed that the prospective intervener obtained a court order dated 3 November 1995 to discharge that registrar's caveats so as to enable those eight pieces of lands to be sold. Yet, the prospective intervener did not claim the 4/10 share nor the sum of RM125,033.91 at that time. In the affidavit of the prospective intervener in Civil Suit No: 214 of 1974 affirmed on 6 September 1995 (exh. P7 of encl. 9), the prospective intervener admitted at para. 5 thereof that the 4/10 share belonged to the plaintiff. Of pertinence to note would be the averments of the plaintiff to the effect that the prospective intervener's claim cannot be

proceeded with as it was caught by the Limitation Act 1953 and for that reason the application of the prospective intervener to intervene should be dismissed with costs.

In the context of encl. 8, I will now proceed to examine encl. 20 which was an affidavit of the defendant. Mr. Adib Azhari bin Daud rightly deposed that it was the defendant's responsibility to obey the order of the High Court dated 7 January 1997 by discharging or removing the registrar's caveat. Pursuant to the order of the High Court dated 7 January 1997, the defendant had since discharged or removed the registrar's caveat and this was reflected in the register document of title that was exhibited as "AAD1" of encl. 20. Mr. Adib Azhari bin Daud verily believed that the cancellation of the registrar's caveat was validly done according to law and for these reasons he craved the court's indulgence to dismiss encl. 8 with costs.

Now, in so far as encl. 8 was concerned Mr. Sagadeva's main concern was prayer (a) thereof and that was to enable the prospective intervener to intervene. Mr. S. Theivanthiran assisted by Mr. Badrol Hisham bin Mohd. Sani argued with style and gusto for the plaintiff and they were against the idea of allowing the prospective intervener to intervene. Mr. Rasid Sudin, senior federal counsel for the defendant, left the matter entirely for the court to decide and he stressed that the prospective intervener must show an interest to protect before intervention can be allowed.

Order 15 r. 6(2)(b)(ii) of the Rules of the High Court 1980 ("RHC") states as follows:

> 6(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...;
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) ...;
>
> or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> but no person shall be added as a plaintiff without his consent signifed in writing or in such other manner as may be authorized.

and the English equivalent of this rule would be O. 15 r. (2)(b)(ii) of the English Rules of the Supreme Court. Kerr LJ in *Sanders Lead Co Inc v. Entores Metal Brokers Ltd* [1984] 1 All ER 857 had this to say of the English Rules at p. 863 right hand column between "b" to "e":

> In my view the rule requires some interest in the would be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough. It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of would be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infringement of a patent, trade mark or copyright with which the intervener is concerned (see *Tetra Molectric Ltd v. Japan Imports Ltd (Win Lighter Corp intervening)* [1976] RPC 541 and *Rexnord Inc v. Rollerchain Distributors Ltd* [1979] FSR 119), though even in such cases the interest of the intervener must raise an existing issue and not merely a contingent one (see *Spelling Goldberg Productions Inc v. BPC Publishing Ltd* [1981] 1 RPC 280). Another illustration is provided by cases where the intervener can show that he will in some way be compelled to 'foot the bill', depending on the outcome of the action (see *Gurtner v. Circuit* [1968] 1 All ER 328 at 331, [1968] 2 QB 587 at 595), though I bear in mind that the wording of Order 15 rule 6(2) was then much narrower than it is now.

Lord Diplock too in *Pegang Mining Co. Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 PC had occasion to consider O. 16 r. 11 of the Rules of the Supreme Court 1957 which is substantially in the same terms as our O. 15 r. 6(2)(b)(ii) of the RHC. At p. 55 right hand column between "G" to "H", his Lordship said:

> In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard.

Further down the same page and spilling over to p. 56 of the same judgment in the same case, Lord Diplock continued:

> It has been sometimes said as in *Moser v. Marsden* [1892] 1 Ch. 487 and in *In re I.G. Farbenindustrie A.G.* [1944] Ch. 41 that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between 'legal'

and 'commercial' interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

Gunn Chit Tuan SCJ speaking for the Supreme Court in *Arab-Malaysian Merchant Bank Bhd v. Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 SC had this to say of a person to be added as a party (at p. 28 of the report):

> Mr. Naban then referred to the following test laid down by the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 at p. 56 for the court to decide whether a person is entitled to be added as a party:
>
> > A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?
>
> and contended that the learned judge had applied the wrong test in this case.
>
> It was held by the Privy Council in the *Pegang Mining Co Ltd* case *(supra)* that one of the principal objects of Order 16, rule 11 of the former Rules of the Supreme Court 1957, is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. It must be noted that the Privy Council in that case added that to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases. Our present Order 15 rule 6 of the Rules of the High Court 1980, which replaced the former Order 16 rule 11 of the Rules of the Supreme Court 1957, is in *pari materia* with Order 15 rule 6 of the UK Rules of the Supreme Court. The scope of the present rule, so far as concerns the joinder of persons not parties, has been significantly extended by the addition of para 2 (b)(ii) which is as follows:
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...
>
> (b) order any of the following persons to be added as party namely ...
>
> (ii) any person between whom and any part to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief of remedy claimed in the cause or matter

> which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following dictum of Lord Denning MR, in that case in which his Lordship said as follows:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to be effectually and completely, determined and adjudicated upon between all those directly concerned in the outcome.

Recently, the Court of Appeal in *Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor* [1997] 2 CLJ 548 had occasion to consider the question of intervention. Abdul Malek Ahmad JCA delivering the judgment of the Court of Appeal at p. 557 remarked:

We hasten to add that we were immediately conscious that the facts in that case were quite distinguishable and this prompted my learned brother Mahadev Shankar JCA, who was chairing the panel, to refer learned counsel to *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 in particular to the passage at p. 55 which reads:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view, one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

> It has been sometimes said – as in *Moser v. Marsden* [1892] 1 Ch 487 and in *Re IG Farbenindustrie AG Agreement* [1944] 1 Ch 41 – that a party may be added if his legal interest will be affected by the judgment in the action but not if his commercial interest only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not sufficient ground to entitle him to be added as a party, they do not find the dichotomy between legal and commercial interest helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

In a nutshell, to intervene a person must show that he has some interest which is directly related to the subject matter of the action. A mere commercial interest in the outcome would not be sufficient. Intervention will be allowed if the intervener's rights or liabilities in relation to the subject matter of the action will be directly affected by an order of the court in the action. It is to prevent injustice that the court will allow a person whose rights will be affected by its judgment an opportunity of being heard. Intervention would also be allowed if the intervener is directly affected legally and financially. But intervention will not be allowed if the proceedings have ended and this was the view of the Court of Appeal in *Hong Leong Finance Bhd v. Staghorn Sdn Bhd* [1995] 2 MLJ 847 and for this purpose I need to refer to the headnotes:

> The appellant ('Hong Leong Finance') had applied to the High Court by originating summons for an order for sale of a piece of land under Order 83 of the Rules of the High Court, 1980 ('the RHC'), based on a *lien*-holder's caveat under section 281 of the National Land Code 1965 ('the NLC'). The High Court granted the order for sale, and the land was sold to a successful bidder who paid the full purchase price for it at a public auction. A certificate of sale was then issued in accordance with section 259(3)(a) of the NLC by the High Court's registrar. Almost two years later, the respondent ('Staghorn') filed an application in the High Court, *inter alia*, for leave to intervene in the proceedings and set aside the sale. The High Court granted Staghorn leave to intervene. Dissatisfied, Hong Leong Finance filed an appeal against the order of the judge. The issue before the court was whether Staghorn was able to intervene after the certificate of sale had been issued to the bidder.
>
> Held, allowing the appeal:
>
> (1) From the opening words of Order 15 rule 6(2), it will be seen that the order to add, join or intervene in the proceedings can be made 'at any stage of the proceedings in any cause or matter'. The question for determination, therefore, was whether there were any proceedings in existence when the order for intervention or the application seeking intervention was made.

(2) The issuance of the certificate of sale by the High Court registrar pursuant to section 259(3)(a) of the NLC was the final stage of the proceedings for an order for sale under Order 83 of the RHC. There were no proceedings in existence after that. Hence, it follows that the order for intervention and the summons for leave to intervene had not been made or issued 'at any stage of the proceedings' as required by Order 15, rule 6 (2).

One strong factor in favour of the prospective intervener was the fact that the order of this court dated 7 January 1997 in regard to encl. 4 was made *ex parte*. It has been said time and again that an *ex parte* order is a provisional order which is liable to be set aside by the court on an application by any person who is affected by that *ex parte* order. And, at this juncture, it would be ideal to apply the principles of natural justice adverted to by me earlier to the advantage of the prospective intervener and it was for this sole reason that I allowed the prospective intervener to intervene. Only prayer (a) of encl. 8 was allowed by me on 2 March 1998.

Enclosure 23

This was heard on 30 June 1998 and the prayers sought for in this enclosure were:

a) perintah bertarikh 7/1/1997 yang di berikan oleh Mahkamah Yang Mulia ini diketepikan;.

b) kos diperuntukkan untuk permohonan ini;

c) lain-lain relief yang difikirkan adil dan suaimanfaat oleh Mahkamah yang mulia ini.

In a nutshell, in encl. 23 the prospective intervener (now an intervener and will hereinafter referred to as an "intervener") sought to set aside the order of this court dated 7 January 1997. Enclosure 23 was supported by an affidavit of the intervener in encl. 7 since there was a notice of intention in encl. 22 by the intervener to use encl. 7. Whereas encl. 9 was the affidavit of the plaintiff and it replied to encl. 7; again there was a notice of intention in encl. 24 by the plaintiff to use encl. 9. As I said earlier, there was no reply to encl. 9. The defendant relied on encl. 20 as a reply to encl. 7 and the defendant also filed a notice of intention in encl. 27 to use encl. 20. Again, as I said earlier there was no reply to encl. 20.

Mr. S. Theivanthiran and Mr. Badrul Hisham bin Mohd Sani for the plaintiff vigorously objected to encl. 23. Mr. Rasid Sudin for the defendant joined in the affray and he too launched an offensive against encl. 23.

The arguments advanced by Mr. Sagadeva for the intervener centred on the facts in encl. 7 and I do not propose to repeat them here. The hearing of encl. 23 enabled this court to adjudicate the matter fully and thereby adhered to the principles of natural justice. The intervener was accorded all leeways to advance his plight through his learned counsel. Impartiality and fairness were exhibited all the way for everyone to see and admire. Order 32 r. 6 of the RHC states that:

> The Court may set aside an order made *ex parte.*

It is now a fundamental rule of practice that a party affected by an *ex parte* order may apply to the court to discharge it since he has had no opportunity of being heard (*Boyle v. Sacter* [1888] 39 Ch D 249, 251; and *H.M.S. Archer* [1919] P. 1, 4). It must be emphasised that the applicant when applying for an *ex parte* order is under a duty to make a full and fair disclosure to the court of all the relevant facts of which he knows. Such failure may be a ground for setting aside the *ex parte* order (*The Hagen* [1908] P. at p. 201; *Lazard Brothers & Co v. Midland Bank* [1933] AC 307; and *Bloomfield v. Serenyi* [1945] 2 All ER 646). As I said earlier, an *ex parte* order is essentially a provisional order where the judge hears the submission and the evidence from one side only. It is for this reason that the court cannot make a definitive order. Thus, when a judge reviews his provisional order in the light of the argument and the evidence emanating from the other party, the judge is in fact not hearing an appeal from his own decision and thus the judge is not in any way inhibited from discharging or varying his *ex parte* order. This seems to be the views of Sir John Donaldson MR in *WEA Records Ltd v. Visions Channel 4 Ltd* [1983] 1 WLR 721; [1983] 2 All ER 589 CA. It is a correct statement of the law to say that where an order is made by a judge *ex parte*, the same judge or another judge of co-ordinate jurisdiction has power to set aside the order after an *inter partes* hearing (*Minister of Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd* [1991] 4 All ER 65 PC). It is also a correct statement of the law to say that an application under O. 32 r. 6 of the RHC must be made timeously. It must be recalled that the plaintiff relied upon two High Court Orders in support of his application in encl. 4. These two High Court Orders were dated 18 July 1978 and 16 April 1980. The latter order remained good and it superceded that of the former.

In short, the High Court order dated 16 April 1980 set aside the High Court Order dated 18 July 1978. There was, in my judgment, a full and fair disclosure by the plaintiff when he applied for the prayers in encl. 4 on 7 January 1997. Never for a moment did the plaintiff conceal the intervener's

name in the affidavit (encl. 2) in support of encl. 4. The name of the intervener was bandied about several times in encl. 2 and in the Orders of the High Court dated 18 July 1978 and 16 April 1980.

The saga in the whole episode went back to 25 years ago. At that time the plaintiff had an option to purchase the 11 pieces of lands referred to earlier and he approached the intervener to go into a business venture. The consideration being that option and the plaintiff merely relied on that option as he had no financial means. The argument that the plaintiff held the 4/10 share in trust for the intervener must be viewed in the light of the scheme of the NLC. Section 344 of the NLC enacts as follows:

> (1) Where, by any instrument of dealing or order of the Court or Land Administrator, any alienated land or share or interest therein is transferred or transmitted to, vested in or created in favour of any person or body 'as trustee', or two or more persons or bodies 'as trustees', the Registrar shall so describe him, it or them in the memorial of registration.
>
> (2) The proprietor or co-proprietors of any alienated land, and any person or body in whom any share or interest in alienated land is for the time being vested, may apply to the Registrar to be registered in respect of that land, share or interest 'as trustee' or, as the case may be, 'as trustees'; and the Registrar shall give effect to any such application by making the appropriate addition to, or amendment of, the existing memorial of registration.
>
> (3) Where the words 'as trustee' or 'as trustees' have been included in any memorial of registration pursuant to sub-section (1) or (2), or the corresponding provisions of any previous land law, any instrument declaring the trusts to which the land, share or interest is subject may, upon payment of the prescribed fee, be deposited with the Registrar for safe custody and reference; and no instrument of dealing shall be unfit for registration by reason only of the fact it refers to any instrument so deposited.
>
> (4) Sub-sections (1) and (2) shall have effect subject to the provisions of section 39 of the Trustee Ordinance 1949 (which *inter alia* provides that, except in the case of any immovable property vested in trustees for charitable, religious or public purposes, the number of trustees of any immovable property shall not exceed four).

and clearly there was non-compliance by the intervener of this explicit requirement to incorporate that trust in the memorial of registration. It must be borne in mind that there is an obligation on the registrar to endorse the memorial or notification of registration with the words "as trustee" when a trust, created outside the NLC, is disclosed in an instrument of dealing. The registrar's obligation is simply to endorse the title and

not to refuse any other dealings with that title which may be contrary to the terms of the trust. To put it bluntly, the declaration of trust as alluded to by the intervener remained a dream that cannot materialise to benefit him. That trust was not even registered on the relevant document of title. Under the Torrens System the register is everything. It is the mirror for everyone to see. Lord Buckmaster in *Creelman & Anor v. Hudson Bay Insurance Company* [1920] AC 194, an appeal from British Columbia, observed at p. 197 when delivering the judgment of the Judicial Committee:

> Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

In the same vein, Lord Wilberforce in *Alan Frederic Frazer v. Douglas Hamilton Walker* [1967] 1 AC 569 said at p. 580:

> It is in fact the registration and not its antecedents which vests and divests title.

The agreements dated 20 January 1973 and 27 February 1974 alluded to by the intervener in encl. 7 and marked as exhs. "TAB1" and "TAB2" were prepared not by way side petition writers but by an advocate and solicitor. It was unfortunate that these agreements were not registered. When the plaintiff failed to exercise the option, the intervener took steps and filed a writ *vide* civil suit no: 214 of 1974 in the High Court of Johor Bahru. That civil suit was filed, according to the affidavit of the intervener in exh. P4 of encl. 9 at para. 14, on 25 July 1974. In that Civil Suit No: 214 of 1974, the intervener claimed, *inter alia*, for specific performance of the agreement and nowhere did the intervener say that the plaintiff was holding that 4/10 of the property on trust. Incidentally, it is germane to mention that the written agreement employed the words "loan or advance" in relation to the monies. Even the affidavits of the intervener in exhs. P3 and P4 of encl. 9 employed the words "loan or advance". The "surat akuan" exhibited as P5 in encl. 9 did not use the word "trust" at all. Until 1997 the intervener did not describe the plaintiff as his trustee. The affidavits and the pleadings too did not raise the question of trust. In 1995 when an application was made to sell eight out of the 11 lots of lands by the intervener and at the same time to remove the registrar's caveat to which the plaintiff had consented, nowhere was it stated that the plaintiff was holding the property in trust for the intervener. In my judgment, it

was an afterthought on the part of the intervener when he used the word "trust" in advancing his cause in encl. 23. L.A. Sheridan in his book "*The Law of Trusts"* 12th edn at p. 191 gave examples of a trust in these words:

> If A pays C for the transfer of C's property to B, the presumption that B holds the property on trust for A arises even if A pays C with money A has borrowed from B (*Hoare v. Hoare* [1982] 13 Fam. Law 142). It does not arise if A, in paying C, intends to make a loan to B (*Bartlett v. Pickersgill* [1760] 1 Edin 515. See also *Hussey v. Palmer* [1972] 1 WLR 1286); or if B pays C with money A has given or lent to B (*Spence v. Brown* [1987] 18 Fam. Law 29);and there are different considerations if A pays C, takes title himself and later transfers it gratuitously to B. Nor does the presumption arise merely because A pays some money to C with hope that further money paid by A to C in the future will induce C to transfer property to A.

and clearly therefore a trust can never be created when the monies were meant for a loan or an advancement like the present case.

H.A.J. Ford and W.A. Lee in their book entitled "*Principles of the Law of Trusts"*, 1983 edn at p. 67 said that: "Equity will only enforce a trust to the extent to which the intention to create a trust is clear." Here, there was no clarity of intention on the part of the intervener to create a trust emanating from the plaintiff to himself. When the intervener advanced the monies to the plaintiff, he was acting in the character of a lender and no resulting trust can possibly arise from that kind of transaction. At p. 964 of the book *"Principles of the Law of Trusts"*, the learned authors said:

> Where X purchases property and directs the vendor to transfer the title to Y, a resulting trust is presumed if Y is a stranger. Y can take beneficially only if he can prove that X intended him to take beneficially. However, the raising of a presumption of resulting trust will only occur where X was putting up the money in the character of a purchaser. There will be no resulting trust if X was financing a purchase by Y by lending Y the amount of the purchase price in the character of a lender.

The cases of *Hodge v. Churchward* [1874] 16 Sim 71 and *Cunningham v. Foot* [1878] 3 App Cas 974 at 990, 995 and 1002 clearly established the principle that a devise of land upon condition of paying a sum of money or an annuity cannot create a trust, although it may create a charge. Professor Keeton in *The Law of Trusts*, 9th edn, 1968, at p. 5 defined trust as:

> ... the relationship which arises wherever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que* trust) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

Simply put, one person in whom property is vested is compelled in equity to hold the property for the benefit of another person, or for some purposes other than his own. Equity can never come to the aid of the intervener. He has come to court with unclean hands as he did not make a full and frank disclosure to the court. The maxim "he who comes into equity must come with clean hands" relates to the past rather than to the future. The intervener must show that his past record in the transaction was clean. It was said in *Jones v. Lenthal* [1669] 1 Ch. Ca. 154 that "He who has committed iniquity ... shall not have equity." Examples of this maxim are abound. I will now proceed to examine some of them. I will start by referring to what Lord King LC said in *Evroy v. Nicholas* [1733] 2 Eq. Ca. Abr. 488 at 489. There his Lordship said that "Infants have no privilege to cheat men". Thus, if an infant fraudulently misrepresenting himself to be of age and thereby obtains from his trustees a sum to which he is entitled only on coming of age, then neither he nor his assignees can compel the trustees to pay the sum over again when he attains full age (*Cory v. Gertcken* [1816] 2 Madd 40; *Overton v. Banister* [1844] 3 Hare 503 at 506, *Nail v. Punter* [1832] 5 Sim. 555; and *Re Lush's Trusts* [1869] 4 Ch. App. 591). Another example would be the situation where the tenant whose lease has been forfeited for non-payment of rent cannot expect relief against the forfeiture if the tenant has been using the premises as a disorderly house (*Gill v. Lewis* [1956] 2 QB 1 at 13, 14 and 17). Yet another example would be the situation where an equitable interest in land granted with a fraudulent purpose cannot be enforced by a person tainted with the fraud (*Mason v. Clarke* [1954] 1 QB 460 which was subsequently reversed *vide* [1955] AC 778 on the ground that there was no fraud being proved). So much for the digression. Reverting back to the mainstream of the case, I say that the intervener's actions were inconsistent with the concept of trust. Previously, the intervener filed an action based on contract to sue under the agreement. In my judgment, the intervener must be estopped from claiming that there was a trust. Section 115 of the Evidence Act 1950 enacts as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.
>
> ILLUSTRATION
>
> A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it.

> The land afterwards becomes the property of A and A seeks to set aside the sale on the ground that at the time of the sale he had no title.
>
> He may not be allowed to prove his want of title.

and it deals with estoppel by conduct and clearly provides that when a person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, then neither he nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person or his representative. Choor Singh J in *Industrial & Commercial Realty Co Ltd v. Merchant Credit Pte Ltd* [1980] 1 MLJ 208, 209 relied on Lord Denning's book entitled "*The Discipline of the Law*" to define the doctrine of estoppel and this was what his Lordship said:

> The doctrine of estoppel has been explained by Lord Denning in his book, *The Discipline of the Law*, at p. 217:
>
> > Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J put it in these words: 'The principle upon which *estoppel in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.
>
> And at page 223:
>
> > It is a principle of justice and of equity. It comes to this: When a man, by his words or conduct, has led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.

Of relevance here would be estoppel by conduct and Raja Azlan Shah FJ (as His Highness then was) in *Public Textiles Bhd v. Lembaga Letrik Negara* [1976] 2 MLJ 58 FC at p. 60 said of this doctrine in these words:

> Therefore, mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then deliberate silence or inaction becomes equivalent to a representation as much as if a representation has been made by express language or positive acts. I propose to refer only to *Greenwood v. Martin's Bank Ltd* [1933] AC 51 as it affords a good example of a whole line of cases on the subject. In that case the husband owed a duty to the bank to disclose his wife's forgeries when he became aware of them so that the bank could take steps to sue the forger, but through his silence or failure to

disclose the bank was prevented from taking action against the forger. In an action by the husband against the bank to recover the sums of money paid out by the latter on account of his wife's forgeries, the husband, because of his silence or failure to disclose the forgeries which he was under a legal duty to do, was held estopped from asserting the cheques were forgeries. Scrutton LJ in the Court of Appeal (*Greenwood v. Martin's Bank Ltd.* [1932] 1 KB 379, 380) states the principle with great precision:

> The classic exposition of the principle of estoppel is that given by Parke B. in delivering the judgment of the Court in *Freeman v. Cooke* [1848] 2 Ex. 654, 663. He cites the rule in *Pickard v. Sears* [1837] 6 A. & E. 469, 474: 'That, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' And continues, 'The principle is stated more broadly by Lord Denman, in the case of *Gregg v. Wells* [1839] 10 A. & E. 90, 97, where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

Lord Tomlin in the House of Lords [1933] AC (on page 58) said:

> The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced – namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel.

So too would estoppel by representation be relevant in the present case. It has been defined by Grimberg JC in *Fu Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd* [1989] 2 CLJ 296, by referring to a textbook and this was what he said:

> The editors of Spenser, Bowyer and Turner on *Estoppel by Representation*, 3rd Ed, consider the following to be a satisfactory definition of estoppel by representation:
>
> > where one person ('the representor') has made a representation to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his

> position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

These two estoppels when applied to the factual matrix of the present case would, in classical style, bar the intervener from raising the issue of a trust.

Now, if at all, the intervener had a case against the plaintiff, it would be in regard to a contract in relation to money advanced and received. Sadly this would be caught by the axe of limitation. In the affidavit of the plaintiff in encl. 9 para. 9, there was an averment that the intervener's claim was caught by the Limitation Act 1953. There was no reply to this averment and this meant that the intervener admitted that his claim was statute barred by limitation. The Civil Suit No: 214 of 1974 was filed on 25 July 1974 and it had long expired bearing in mind that the writ was valid for only one year as set out in O. 6 r. 7(1) of the RHC. To me "stale demands" like that of the intervener must be suppressed at all costs (*Cholmondeley v. Clinton* [1820] 2 J&W 1; *A'Court v. Cross* [1825] 3 Bing 329, 333 and R.B. Policies at *Lloyd's v. Butler* [1950] 1 KB 76). The reasons for this are manifold. Foremost, would be that the procedure as sets out in the RHC must be vigorously followed to the letter. The life of the writ had expired years ago and there was no renewal at all. Secondly, the intervener should not be encouraged to procrastinate but he must be moved into action and must proceed with speed and without unreasonable delay. Thirdly, there must be a finality in litigation as the limitation period had expired. To me, there should be a definite end to Civil Suit No: 214 of 1974 as it was caught under the Limitation Act 1953. Sir Thomas Bingham MR in *Dobbie v. Medway Health Authority* [1994] 4 All ER 450 at p. 454 succinctly said:

> But such rules have existed for centuries. They are no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition on pain of being unable to prosecute them at all. But they are also based on the belief that a time comes when, for better or worse, defendants should be effectively relieved from the risk of having to resist stale claims.

Hashim Yeop A. Sani CJ (Malaya), that brilliant judge, in *Credit Corp. (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871, at p. 876 said:

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit*

finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

In *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11, at p. 14 Lord Brightman observed:

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proof of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

Moreover, there was no basis at all for the intervener to challenge the order of this court dated 7 January 1997 because in para. 5 of exh. P7 as seen in encl. 9, the intervener admitted that the 4/10 share belonged to the plaintiff. It was a sheer waste of judicial time for the intervener to mount a challenge to encl. 4.

Another factor in favour of the plaintiff would be this. There was delay in setting aside the order of this court dated 7 January 1997. As I said that order was obtained *ex parte*. Now, before me in encl. 23 the matter has become *inter partes.* All parties are being represented and arguments were advanced at great length. It has been said time and again that setting aside should be prompt. The delay must be construed adversely against the intervener (*Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31 and *Ghulam Muhammad Sayeed & Ors v. Perwira Habib Bank (Malaysia) Bhd & Ors* [1989] 2 MLJ 375). The famous maxim "delay defeats equities" should be vigorously applied to the detriment of the intervener. *Vigilantibus, non dormientibus, jura subveniunt* meaning equity aids the vigilant and not the indolent. Lord Camden LC once said in *Smith v. Clay* [1767] 3 Bro. C.C. 639n at 640n, that a court of equity "... has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

Mr. Rasid Sudin, for the defendant, rightly pointed out that the intervener's application in encl. 23 served no useful purpose at all as the time period for action to be taken had lapsed. He also drew the court's attention to the recent decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC of which I am bound and I wholeheartedly agree with it. I have nothing useful to add.

For these varied reasons, I dismissed encl. 23 with costs.